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IN THE

Supreme Court of the United States

October Term, 1944.

No. 707.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF ALEXANDER J. SHAMBERG, Deceased,
ISIDOR W. SHAMBERG, Administrator.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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I. Preliminary Statement.

In determining whether or not to grant the writ as prayed for the Court will have it in mind that Congress has clearly, definitely and repeatedly manifested its intention to exempt the obligations of States from taxation. Since the organization of "Authorities" is purely a measure of economic and financial convenience, the only effect of a tax on their obligations would be either to compel the States to do directly what they now find it convenient to do through these agencies or else to curtail programs of public improvements and other activities of the sort that produce employment.

If it be urged that the result would be wholesome if "Authority borrowing" were curbed, we respectfully suggest that this question of public policy is primarily legislative and constitutes no sound reason for granting the writ in this case.

The Commissioner in effect asks the Court to discriminate among various classes of State agencies.

It is further suggested that of all times the present would be a most unfortunate time to hamper States and municipalities in planning to relieve the cyclical depression that inevitably follows a war.

II. Statement of Facts.

A Supplemental Statement of Facts is set forth in the Appendix.

III. Reply to Reasons Given for Granting the Writ.

While the Commissioner specifies seven errors which he proposes to urge, the reasons actually given for granting the writ are four in number. No one of them raises a constitutional issue.

1. The first is the administrative importance of "an authoritative guide" for the determination of the tax status of interest on agency obligations.

This reason presupposes a present administrative uncertainty which does not in fact exist. For almost thirty years under every income tax act down to the time when the Commissioner himself departed from the settled practice of his Bureau and assessed the tax in question there had been an unbroken series of treasury rulings, treasury regulations and treasury practice, as well as the opinions of two Attorneys General. These rulings and opinions (Exhibits 2 and BB) cumulatively constituted an "authoritative guide" of a definite and satisfactory sort. When the Commissioner by his revolutionary ruling undertook to weaken the authority of this guide he was quickly checked by the Tax Court and by the Circuit Court of Appeals. The status quo ante has now been restored. There is, we submit, no occasion for action by this Court. Were there any cogency in the reason now

under consideration it certainly would have appealed to the Tax Court which is ideally fitted to deal with the sort of question which the instant case presents. From recent decisions of this Court [1] it is evident that findings of the Tax Court are to be accorded great significance and weight. Unless some measure of finality is imputed to the judgments of the Tax Court in cases like this, there is no way in which the Supreme Court can protect itself against a flood of tax appeals.

The simple fact is that billions of dollars of bonds have been issued, sold and resold on the basis of the universal understanding that the income from such bonds is by statute exempt from federal taxation. During all the years not a dollar of tax was exacted by an Internal Revenue Collector until, to start a "test case", a half dozen bondholders were selected as subjects for experiment. The release cited in the footnote [2] shows that the Treasury hoped to induce this Court to reconsider its previously expressed views and further hoped that, having secured such a reconsideration, the way would be open for an appeal to Congress to repeal the statutory exemption. This is nothing more nor less than an attempt to get this Court to exert a kind of collateral pressure upon Congress after direct pressure during a period of over thirty years had wholly failed. It is significant to note that since 1913 many bills have been introduced into Congress in a vain attempt to repeal the exemption or to launch a constitutional amendment.[3] It is a fair inference from this record that if an

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[1] *Dobson v. Commissioner*, 320 U. S. 489 (1943); *Security Mills Co. v. Commissioner*, 321 U. S. 281 (1944); *McDonald v. Commissioner*, 13 Law Week 4013 (Nov. 21, 1944); *Commissioner v. Scottish American Investment Co.*, 13 Law Week 4033 (Dec. 5, 1944).

[2] The statement of the Treasury issued at the time this action was commenced is set forth in full in the Appendix.

[3] Bills introduced in the House numbered 8 and in the Senate 2. Resolutions proposing constitutional amendment numbered 79 in the House and 18 in the Senate.

act to limit the exemption by excluding "Authorities" would have had the least chance of success, legislation to effect the limitation would have been proposed long ago. On the contrary, as appears from the treasury release already cited, everybody, including the Commissioner, assumed that the real question intended to be presented in this case is the exemption of the obligations of States and that as long as this is preserved, the exemption of the agent would follow as a matter of course. What was started as a test case has now degenerated into a mere controversy as to whether the obligations of State Authorities are or are not within the statutory exemption. This is a mixed question of statutory interpretation and administrative practice which has been dealt with effectively by the Tax Court and by the Circuit Court of Appeals.

It is the Treasury's announced intention to seek to undo the decision of this Court, if it is in favor of the Petitioner, by obtaining legislation abating back taxes on Authority bonds. (Exhibit 1.) The Court has already refused to be a party to a similar arrangement in *Helvering v. Griffiths,* 318 U. S. 371 (1943), observing that "This assurance that if we will but find that Congress has intended to lay the tax it will be asked to declare that it does not intend it to be collected is hardly reassuring that the decision contended for would be what Congress intended."

2. The second reason is an alleged conflict between the decision of the Circuit Court of Appeals and the decision of this Court in *Helvering v. Gerhardt,* 304 U. S. 405 (1938). We submit that upon analysis it will be found that there is no such conflict as is asserted by the Commissioner.

In the *Gerhardt* case the question was whether an employee of the Authority might successfully claim exemption from income tax. There was no specific statutory exemption to which he could appeal but merely a treasury regulation which construed the revenue act as exempting by implication the compensation of employees of a State or

of a political subdivision thereof for "services rendered in connection with the exercise of an essential governmental function of the State." Neither the Circuit Court of Appeals nor this Court disturbed the careful and exhaustive fact-findings of the Board of Tax Appeals respecting the nature and scope of the Authority's activities. Apparently accepting the facts as found, this Court held that the tax in question was non-discriminatory and that the employment of the petitioner was not shown to be different from that of similar employees of private industry. The Court therefore concludes that employees of the Port Authority are not employees of the State or a political subdivision of it "within the meaning of the regulation." The majority of the judges of the Tax Court and the Circuit Court of Appeals in this case thought (and, we submit, correctly) that this was not an adjudication of the legal status of the Authority but merely a decision that the services of the employee were not such as to come within the scope of the Treasury Regulation. This view is supported by the fact that in the *Gerhardt* case this Court was careful to express "no opinion whether a federal tax may be imposed upon the Port Authority itself with respect to its receipt of income or its other activities, we decide only that the present tax neither precludes nor threatens unreasonably to obstruct any function essential to the continued existence of the state government." This reservation would have been manifestly superfluous if the Court had intended to deny to the Authority, under any and all circumstances, the status of a State or of a political subdivision thereof.

3. The third reason given is that the obligations of the Authority are not those of a State or of a political subdivision and were not issued on behalf of a State. This, we respectfully submit, is the mere assertion of a conclusion. The decision of the Circuit Court of Appeals that the Authority's obligations are those of a State or are issued on behalf of a State is not (as suggested by the Commissioner) "at war with the facts" but is in strict

conformity with all the facts as found. This becomes clear upon a mere perusal of the Stipulation of Facts (1 R. A. 36-89) and of the majority opinions in the Tax Court and the Circuit Court of Appeals. In this connection we submit the following three suggestions:

(a) That the Tax Court is ideally fitted to determine such a question of fact as what constitutes sound administrative precedent and what, on the point in issue, the intention of Congress actually is. The controlling importance of the decisions of the Tax Court in cases of this sort has been emphasized by this Court in *Dobson v. Commissioner,* supra. We submit that on this record there is no sound reason for reviewing this determination.

(b) That beyond all question, the respondent-Authority is a body politic and corporate and that to it have been subdivided some of the functions of the constituent States. The question is not whether the Authority *is* the State or wields all of its powers but whether it is discharging on behalf of the State a limited function which the State itself might discharge directly.

(c) That the interpretation placed by the Circuit Court of Appeals upon the term "political subdivision" is in precise accordance with the contention that the Department of Justice recently made in *Platte Valley Public Power & Irrigation District v. County of Lincoln,* Nebraska Supreme Court Journal April 18, 1944, p. 235. In this case the Government of the United States, being the owner of the obligations of the Power & Irrigation District, contended that the property of the District was exempt from State taxation under a provision of the Nebraska Constitution which exempted the property of "governmental subdivisions" from taxation. Of a contrary decision by the lower court the brief of the United States had this to say:

"The lower court held that the phrase 'governmental subdivision' as used in Section 2 of Article VIII of the Constitution had to be construed 'so as to include only subdivisions of the state that have as their primary purpose the performance of governmental functions, as distinguished from proprietary functions.' The distinction between 'governmental' and 'proprietary' powers was made originally with respect to municipal corporations in order to form a basis for implied civil liability for damages caused by the negligent execution of powers of the character commonly exercised by private individuals as well as by public corporations. This distinction still exists primarily as a basis for determining tort liabilities of public bodies. 1 Dillon, Corporations, Sec. 39. It has also been employed in sustaining federal taxation of the business activities of states. See South Carolina v. United States, 199 U. S. 437. It seems very unlikely that either the framers of the constitution or the public which approved it had this highly technical distinction in mind when they established by their constitution a tax exemption for the property of the state and its governmental subdivisions."

The Supreme Court of Nebraska decided in accordance with the contention of the United States and reversed the judgment appealed from.

4. The fourth and final reason given is that even if the statutory exemption applies to State instrumentalities in general, it is inapplicable to the respondent because created by interstate compact requiring the consent of Congress.

We respectfully suggest that this contention is a mere make-weight.

If the policy behind the exemption clause is considered it is hard to think of any reason why Congress should have wished to exempt an agency of one State and to tax an

agency of two. It is not a situation in which there is any fundamental difference between joint and several State activities. If New York and New Jersey had simultaneously created two corporate agencies and directed them to cooperate, each would have been (by supposition) a political subdivision of the constituent State and the bonds issued by each would have been exempt. We submit that the exemption in such a case would have been due to the desire of Congress to respect the initiative of the States as independent sovereignties each discharging its proper governmental functions and that this congressional policy is a matter of substance, not of form, and is as applicable where the action is joint as it would be if the States acted severally. Had the exemption clause read thus: "the obligations of States, Territories and the political subdivisions thereof", the plural form of words would have drawn the sting from the petitioner's argument based on the singular form—but the meaning would not really have been different. The common sense interpretation of the actual language is that the exemption is applicable to a political subdivision of States as well as to a political subdivision of *a* State.

For these reasons the respondent contends that the Authority is, as respects the exemption clause, as much within the exemption accorded by Congress to political subdivisions as is the Triborough Bridge Authority which is the agency of a single State.

In the course of the argument in support of the petition for the writ, the Commissioner urges that the Authority is to be classified now as if it were a "public utility corporation." After nearly twenty-five years of recognition as a governmental agency this contention does violence to the nature of the Authority as determined by the court below and as required by the facts included in the

"stipulation of facts." We do not think this Court will require argument to brand the contention as altogether unrealistic.

We respectfully submit that the Commissioner's petition for certiorari should be denied.

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